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No. 90-1166

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LONG ISLAND TYPOGRAPHICAL UNION,
No. 915, CWA, AFL-CIO,

Petitioner,

vs.

NEWSDAY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

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February 22, 1991

QUESTIONS PRESENTED

1. Whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violated a statute, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a law?

2. Whether a reviewing court may substitute its judgment for that of an arbitrator in order to increase a penalty meted out to an employee so as to ostensibly provide greater vindication of a public policy?

3. Whether the public policy against sexual harassment in the workplace is so overriding so that reviewing courts may carve an exception to the traditional policy against vacating arbitration awards?

PARTIES TO THE PROCEEDINGS

A. The parties to the proceedings below all appear in the caption to this case.

B. Pursuant to this Court's Rule 29.1, Newsday, Inc. provides the following statement of parent companies and subsidiaries except for wholly-owned subsidiaries:

Newsday, Inc. is a wholly-owned subsidiary of the Times Mirror Corporation. Newsday does not have any non wholly-owned subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90 - 1166

LONG ISLAND TYPOGRAPHICAL UNION,
NO. 915, CWA, AFL-CIO,

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

Respondent Newsday, Inc. ("Newsday") respectfully requests that the Petition for a Writ of Certiorari of Petitioner Long Island Typographical Union, Local No. 915, CWA, AFL-CIO,

("the Union") to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 915 F.2d 840. The opinion of the District Court, which is reprinted in the Petitioner's Appendix, is not reported.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 5, 1990. This Court received Petitioner's original Petition for a Writ of Certiorari on January 3, 1991. By letter dated January 4, 1991, the Clerk of the Court

notified Petitioner that its Petition failed to comply with Rules 29.1 and 33.2(7) of the Rules of the Supreme Court. The Clerk's letter directed Petitioner to conform its Petition to the requirements of the Court's Rules and informed the Petitioner that the Court was retaining one copy of the original Petition. Respondent received Petitioner's amended Petition on January 25, 1991.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, the Equal Employment Opportunity Commission Guidelines On Discrimination Because of

Sex, 29 C.F.R. Part 1604 and Section 291 of the New York Executive Law are set forth in the Appendix hereto.

STATEMENT OF THE CASE

A. Statement Of The Facts

This action arises out of Newsday's decision in July 1988 to terminate the employment of William Waters, a Compositor in Newsday's Composing Room, after he engaged in repeated instances of sexual harassment of female co-workers. Newsday's decision came at the end of a five-year period during which Mr. Waters committed multiple instances of highly offensive physical contact against female co-workers. Prior to his termination, Mr. Waters had been suspended for engaging

in the same physical abuse of female co-workers and had received an arbitrator's final warning that any repeat of this misconduct would result in discharge.

Newsday first disciplined Mr. Waters for sexual harassment in 1983 after it received complaints from female workers in the Composing Room about inappropriate and offensive physical touching by Mr. Waters. 915 F.2d at 842. Based upon these complaints, Newsday terminated Mr. Waters on June 21, 1983 for "disorderly conduct" in violation of the Composing Room Office Rules. Id. Although Newsday voluntarily reinstated Mr. Waters four days later, the Union nonetheless grieved this form of suspension under the collective bargaining agreement between Newsday and the Union.

In February 1984, Arbitrator George F. Sabatella issued an award sustaining the company's discipline of Waters after finding that "when Mr. Waters was occasioned to pass by [the complaining] female employees certain 'offensive and unauthorized contact' took place." Id. Arbitrator Sabatella also issued a clear and unmistakable warning that such conduct would not be tolerated in the future.

> Furthermore, I am also of the opinion the type and degree of misconduct which was the basis of Mr. Waters' disciplinary action can not in any way be tolerated in the workplace for it disrupts and demoralizes the people functioning of [sic] a unit. Any action on the part of Mr. Waters which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leniency [sic].

Id.

Notwithstanding this warning, Waters continued to engage in the same

kind of sexual harassment of his co-workers. In July 1988, a female employee complained to both Newsday and the Union that, late in the evening of July 7, 1988, Mr. Waters had brushed up against her lower back and upper buttocks. Id. She also complained that, approximately 10 minutes after brushing up against her, Mr. Waters slammed into her back and said "Excuse me!" in a tone that led her to believe that he had intentionally run into her. Id. Upon receiving this complaint, Newsday undertook a full investigation of the incident.

During its investigation, Newsday discovered that, since his 1983 termination, Waters had made offensive physical contact with at least two other female employees in the Composing Room. In late 1983 or early 1984, Waters

approached a probationary employee from behind and "put his hand on her rib cage and started moving it down towards her waist." Id. The offensive contact stopped only after the employee "grabbed Mr. Waters' hand and told him she would break his fingers if he ever did that again." Id. In December 1986 Waters approached another female co-worker from behind and "slapped her on the rear end." Id.

After the investigation, the company terminated Waters' employment, again for engaging in multiple acts of sexual harassment against female co-workers. The Union then filed a grievance claiming that just cause did not exist to terminate Waters' employment. Thereafter, the matter proceeded to arbitration before Arbitrator Richard Adelman.

In his award dated July 25, 1989, Arbitrator Adelman expressly found that Waters sexually harassed female co-workers and that the incidents were highly offensive to his co-workers. Rejecting the Union's position that the incidents never happened, Arbitrator Adelman's factual findings specifically provided:

> [T]here is no doubt that the actions by Mr. Waters in moving his hand down [one co-worker's] back from her rib cage to her waist, in slapping, or patting, [another co-worker] on her rear end, and in slamming into [a third's] back was conduct that violated both the composing room office rules and Newsday's policy against "harassing, abusive or intimidating" behavior. This conduct was quite offensive to the women involved, and clearly constitutes harassment under Newsday's policy, as well as interference with "the business of the office" under the rules of the composing room.

915 F.2d at 843

Arbitrator Adelman also rejected contentions by the Union that the incidents were "minor in nature" and that Newsday used the incident as a pretext to discharge an employee with a job guarantee. (Pet. App. at A-3).[1/] He found that Newsday's decision to terminate Mr. Waters "surely was not pretextual, nor was it the result of an overreaction to the clear facts uncovered by Newsday's investigation." Id.

Notwithstanding these findings, Arbitrator Adelman reversed Waters' discharge. Despite finding it significant that Waters had been disciplined for similar misconduct and acknowledging the unmistakable warning given to Waters by Arbitrator Sabatella in 1984,

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1/ "Pet. App." refers to the Appendix to the Union's Petition for a Writ of Certiorari.

the award stated that Waters should be subject to progressive discipline. 915 F.2d at 843. As such, the award stated that Waters should be reinstated without back pay. Id. The award also imposed the condition that Newsday had the right to have Waters examined to determine whether he was medically fit to perform his job. Id.

B. The Proceedings Below

On September 27, 1989, Newsday commenced this action in the United States District Court for the Eastern District of New York to vacate Arbitrator Adelman's award under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. On November 20, 1989, Newsday filed a motion for summary judgment seeking judgment on the

ground, among others, that the arbitrator's award violated the well-defined public policy against sexual harassment in the workplace.

By Order dated February 6, 1990, the District Court granted Newsday's motion. After reviewing the governing law on sexual harassment the District Court concluded that " [a] clearer expression of a well-defined public policy . . . will not be more readily found." (Pet. App. at A-7). The District Court then held that Arbitrator Adelman's award violated that well-defined and dominant policy against sexual harassment in the workplace. The District Court stated in its opinion that the "inevitable consequence" of reinstating Waters would be to "compel his female co-workers to submit to [Waters'] sexual harassment

. . . as a condition of their employment and to permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment." (Pet. App. at A-6). The District Court also concluded that the public policy against sexual harassment is "subverted when an employer is required to reinstate an employee who is a chronic sexual harasser . . . ." (Pet. App. at A-7).

The Second Circuit affirmed the District Court's judgment. In analyzing the issues raised on appeal, the Court applied the two-part test set forth in United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987). First, the Court examined statutes, regulations and judicial precedents to determine whether there existed a well-defined and dominant

public policy against sexual harassment in the workplace. Second, the Court addressed whether the arbitrator's award violated that public policy. The Court answered both questions affirmatively.

In its opinion, the Court of Appeals engaged in an extensive analysis of employees' rights under federal and New York law to be free from sexual harassment in the workplace and the corresponding duties of employers to take effective actions to protect those rights. Among other sources of public policy, the Court relied upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to 2000e-17, the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604, § 291 of the New York Executive Law, and

this Court's decision in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

After examining the public policy set forth in these sources, the Second Circuit concluded that the District Court properly vacated the arbitration award on the ground that it violated public policy. In reaching its conclusion, the Second Circuit determined that the award had improperly disregarded the public policy against sexual harassment and the fact that a prior Arbitrator had stated that any further acts of harassment would be grounds for immediate discharge. 915 F.2d at 845. The Court also determined that the award tended "to perpetuate a hostile, intimidating and offensive work environment." Id. "Above all," the Court concluded, "the award prevents Newsday

from carrying out its legal duty to eliminate sexual harassment in the workplace." Id.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision in this matter is correct, and further review is not warranted. The Court of Appeals' decision does not present an important question of federal law yet to be decided by this Court, nor does it conflict with any decision of this Court or with opinions of the lower federal courts. The Court of Appeals' decision merely presents a fact-specific application of principles firmly established by this Court.

The Court of Appeals' decision, moreover, does not raise any of the questions presented in the petition for

review. The Court of Appeals did not address, much less decide, Petitioner's issue of whether an arbitration award could be overturned on public policy grounds only if the award violated a statute, regulation or other manifestation of positive law, or compelled employer conduct that violated the law. The Court had no reason to address this question because it held that the reinstatement of plaintiff would conflict with Newsday's legal duty to eliminate sexual harassment from the workplace. Thus, this is not a case where an award was overturned based upon a conflict with public policy that did not involve a violation of positive law. At most, the Union's Petition is challenging the Court of Appeals' application of settled legal principles to the undisputed

facts of this case. This issue does not warrant grant of the Petition.

The remaining questions Petitioner attempts to raise are simply argumentative characterizations of the Court of Appeals' decision as opposed to legitimate questions presented for review by this Court. The Court of Appeals' decision did not purport to provide a "greater vindication" of public policy by substituting its judgment for that of the Arbitrator as to the appropriateness of the punishment meted out to Mr. Waters. Nor did the Court of Appeals' decision purport to create special rules under which arbitrators' awards are examined in sexual harassment cases. The Court of Appeals only examined the arbitration award under the particular requirements of the public policy against sexual

harassment and concluded that it conflicted with those requirements.

A. The Court Of Appeals' Decision Is Correct And Does Not Raise Unsettled Issues Of Federal Law That Require Review By This Court.

The sole issue raised by the Court of Appeals' decision in this matter is whether the Court of Appeals correctly held that, in the factual context of this case, the arbitrator's award directing reinstatement violated the public policy against sexual harassment. This holding does not raise any unsettled issues of law. This Court has recently reaffirmed that the courts have the power to vacate an arbitrator's award that violates well-defined and dominant public policy. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. at 42-43; W. R. Grace &

Co. v. International Union of United Rubber Workers, Local 759, 461 U.S. 757, 766 (1983). It is equally well settled that there is a well-defined and dominant public policy granting employees the right to work in an environment free of sexual harassment which places a corresponding duty upon employers to eliminate sexual harassment from the workplace. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 64-73; 29 C.F.R. § 1604.11(a), (d)-(f). Thus, the Court of Appeals' decision constitutes the fact-specific application of settled law. It does not raise any important legal issues for the Court's review.

The Union nonetheless contends that review of the Court of Appeals' decision is warranted to address a question this Court left undecided in

United Paperworkers v. Misco, Inc., 484 U.S. at 45 n.12. This question is whether "a court may refuse to enforce an award on public policy grounds only when the [arbitrator's] award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." Id. According to the Union, this issue is ripe for review, on the one hand, because this Court and others have declined to address this issue and, on the other hand, because an alleged conflict exists among the circuits. These conclusory and contradictory arguments, however, are simply a strained attempt to obtain review of the Court of Appeals' decision based upon an issue that was not addressed, much less decided, in that decision.

As the Union concedes in its Petition, the Court of Appeals' decision did not reach this issue that it now raises for review before this Court. (Petition at 6). Rather, the Court of Appeals' decision held that the arbitrator's award must be vacated on the ground, among others, that the award prevented Newsday from fulfilling its duty under Title VII to eliminate sexual harassment from the workplace. This holding that the award violated positive law made it unnecessary for the Court of Appeals to address or decide whether an arbitrator's award could be overturned based upon a violation of public policy that did not expressly conflict with statutory obligations or other manifestations of positive law.

By focusing on issues not raised by the Court of Appeals' decision, the Union's Petition fails to acknowledge the premise for that decision. The holding of the Court of Appeals is rooted in its determination that the arbitrator's award did conflict with the proscriptions contained in both federal and state laws against sexual harassment. The Union's Petition, however, ignores the statutes, regulations and cases that address the issue of sexual harassment in the workplace. Thus, while the Union attacks the Court of Appeals' decision as a radical departure from judicial precedents, its Petition is devoid of any legal argument challenging the cornerstone of the Court of Appeals' conclusion that the award violated public policy.

An examination of the governing legal principles, moreover, demonstrates that the Court of Appeals' decision is in line with settled law. Petitioner does not dispute the proposition that employees have a federally protected right to work in an environment free of sexual harassment. In Meritor Sav. Bank v. Vinson, 477 U.S. at 66-67, this Court held that discrimination based on sex which creates a hostile or abusive working environment constitutes a violation of Title VII.

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Vinson, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

In reaching its holding in Vinson, this Court approved the EEOC's definition of sexual harassment in its Guidelines on Discrimination Because of Sex. The EEOC's Guidelines provide in relevant part:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (footnote omitted). In this regard, the EEOC has concluded that unwelcome physical contact is a particularly egregious form of sexual harassment. "More so than

in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." EEOC Policy Guidance: Sexual Harassment, N-915.050, reprinted in EEOC Comp. Man. (BNA) N:4031, 4047 (March 19, 1990).

It is also firmly established that the rights of employees to a work environment free from sexual harassment places corresponding duties upon their employers. An employer may be held liable under Title VII for the sexual harassment of an employee by a co-worker when it knows or should have known of the harassment and fails to take "immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). Thus, discipline that is not reasonably calculated to stop the harassment and provide a non-hostile environment

conflicts with an employer's obligations under Title VII. Ellison v. Brady, No. 89-15428, slip op. (9th Cir. Jan. 23, 1991) (Available on Westlaw, 1991 WL 4579). See also Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989) ("An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case . . . .")

An employer's obligation to provide a non-hostile environment, moreover, may require that the harasser be removed from the workplace. As the Ninth Circuit recently explained:

> [I]n some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment. To avoid liability under Title VII for failing to remedy a hostile environment, employers may even have

> to remove employees from the workplace if their mere presence would render the working environment hostile.

Ellison, 1991 WL 4579 at 10 (citation and footnote omitted). Simply stated, when an employee's mere presence creates a hostile environment, an employer cannot remedy the hostile environment except by removing the employee. Id. at 15 n. 19.

Applying this basic legal framework, the Second Circuit made the correct conclusion based upon the undisputed facts of this case that the arbitration award placing Waters back in the workplace violated the well-defined and dominant public policy against sexual harassment. Newsday was not faced with an employee who committed an isolated instance of sexual harassment that blemished an otherwise spotless record. Mr. Waters had engaged in

multiple instances of highly offensive physical abuse of female employees. Mr. Waters had also demonstrated that he was not amenable to discipline on this issue. He continued to engage in highly offensive sexual harassment notwithstanding the fact that he had received a clear warning that such continued misconduct would result in dismissal and that he would be shown no leniency or given the benefit of any doubt. Under such circumstances, the apprehension Mr. Water's mere presence in the workplace caused Newsday's female employees could not be relieved by additional punishment or by management preventive measures. The only way Newsday could assure female employees their right to work in a non-intimidating environment was to remove Mr. Waters from the workplace.

By ordering Mr. Waters' reinstatement despite his previous punishment and issuing a new warning that he would be terminated if he engaged in similar misconduct in the future, the Adelman arbitration award had the effect of recreating the hostile environment that existed prior to Mr. Waters' termination. Title VII, however, not only granted Mr. Waters' female co-workers the right not to be physically abused but also the right to work in an environment free of the well-founded fear of such abuse. Like their male counterparts, Mr. Waters' female co-workers have the right to work without having to be apprehensive or alarmed every time they are in Mr. Waters' presence.

B. The Court of Appeals' Decision Did Not Purport To Increase The Severity Of The Punishment To Provide A "Greater Vindication" Of Public Policy And Did Not Create An Exception For Arbitration Awards Involving Sexual Harassers

The Union's Petition also contends that review of the Court of Appeals' decision is warranted because the decision departed from the accepted and usual course of proceedings, and sanctioned such a departure by the District Court. The Union submits two arguments in support of this contention. First, the Union argues that, in order to provide a "greater vindication" of public policy, the Court of Appeals incorrectly substituted its judgment for that of the Arbitrator as to the appropriateness of the punishment meted out to Mr. Waters. Second, the Union argues that the Second Circuit established an across-the-board rule requiring that

employees accused of sexual harassment be dismissed. Neither argument finds any basis in the Second Circuit's opinion.

The Union's argument that the Court of Appeals sought to substitute its judgment for that of the Arbitrator mischaracterizes the Court's holding. The issue addressed by the Court did not involve a contractual determination of whether Waters was punished too severely or not severely enough for his continued sexual harassment of his female co-workers. Rather, it involved a fact-driven determination of whether placing Waters back into his former position violated the public policy against sexual harassment. The Court of Appeals concluded that Newsday's obligations under Title VII to provide its employees with a non-hostile

environment required it to remove Mr. Waters from the workplace when he continued to harass female employees in the face of prior discipline and a prior categorical warning. The Court of Appeals did not substitute itself as interpreter of the contract but rather confined its role to the determination of whether the award violated the well-defined and dominant public policy against sexual harassment.

Contrary to the Union's assertion, moreover, the Court of Appeals' opinion does not even remotely suggest an across-the-board rule mandating that grievants "accused" of sexual harassment be discharged. Nor does the opinion suggest that such persons have a more onerous burden in avoiding discharge than those persons accused of other forms of misconduct. This case

stands on its own facts involving an employee found by the Arbitrator to have an extensive record of physical abuse that continued unabated in the face of an unmistakable warning that he would be discharged if he continued to engage in his highly offensive harassment of female employees. Obviously, other cases will involve situations where the employer's obligations to abate the hostile environment will not require the employee's removal from the workplace. But these situations were not before the Court of Appeals and are properly not addressed in its decision.

Equally without merit is the Union's contention that the Court of Appeals' decision "carves out" a special exception for an arbitrator's award involving discipline for sexual

harassment.[2/] There is absolutely nothing in the opinion that in any way justifies such a contention. The Court of Appeals' decision involved a straightforward application of the two-part analysis set forth in Misco to the particular facts of this case without "carving out" any special exception for sexual harassment cases. To be sure, the requirements of particular public policies differ from statute to statute but there is nothing in the Court of Appeals' opinion that suggests a deviation from the basic analytical

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2/ The Union states in its Petition the third question presented is "[w]hether the public policy against sexual harassment in the workplace is so overriding so that reviewing courts may carve an exception to the traditional policy against vacating arbitration awards?" As noted above, there is nothing in the Court of Appeals decision that justifies this argumentative characterization of its holding. There is also no argument in the Union's Petition that addresses this question which the Union claims is presented to this Court.

framework for review of arbitrators' awards.

Furthermore, the cases discussed at the close of the Union's Petition provide no support for its argument that the Court of Appeals' decision constitutes a departure from settled law. Apart from the fact that the decisions are of limited relevance because they do not involve the statutory proscriptions against sexual harassment, none of the decisions involved a statutory requirement that an employer take prompt and effective action to remedy a condition caused by an employee. Rather, they all involved circumstances under which the courts quite properly refused to vacate awards based upon vague, generalized assertions of public policy.

For example, in Kane Gas Light and Heating Co. v. International Bhd. of Fireman and Oiler, Local 112, 687 F.2d 673 (3d Cir. 1982), cert. denied, 460 U.S. 1011 (1983), the Third Circuit declined to vacate an arbitrator's award because there was no public policy that prohibited the reinstatement of a gas company employee who turned off the company's gas supply to its customers. Similarly, in Amalgamated Transit Union v. Aztec Bus Lines, 654 F.2d 642 (9th Cir. 1981), the Ninth Circuit declined to vacate an arbitration award of reinstatement because the employer could not point to any legal requirement that it terminate a bus driver who had exhibited poor judgment. Likewise, in Local 453 v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), cert. denied, 373 U.S. 949

(1963) and International Ass'n of Machinists v. Campbell Soup Co., 406 F.2d 1223 (7th Cir.), cert. denied, 396 U.S. 820 (1969), the courts declined to vacate awards reinstating employees convicted of engaging in gambling activities on company premises because there were no legal requirements proscribing the employment of such individuals.[3/]

In contrast to the above cases, Arbitrator Adelman's award does conflict with a well-defined statutory

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3/ The district court decisions cited by the Union are similarly distinguishable. See Premium Bldg. Prods. Co. v. United Steelworkers of America, 616 F. Supp. 512 (N.D. Ohio 1985) (reinstatement of employee caught smoking marijuana on company premises), aff'd without op., 798 F.2d 1415 (6th Cir. 1986); Service Employees International Union, Local 722 v. Children's Hosp. Nat'l Medical Center, 640 F. Supp. 272 (D.D.C. 1984) (reinstatement of nurse fired after scolding and laying hands on young patient). Neither case involved a legal requirement mandating that an employer take action to remedy a condition caused by an employee's misconduct.

obligation on the part of an employer. The Court of Appeals based its holding on the determination that the award conflicted with Newsday's duty to take effective action in order to ensure equality of working conditions for its employees. This duty rests upon statutory dictates under federal and state law, not upon generalized notions of the public interest. As such, the Court of Appeals correctly concluded that public policy required that the arbitration award be vacated.

CONCLUSION

For the foregoing reasons, Respondent Newsday, Inc. respectfully requests that the Union's Petition for a Writ of Certiorari to the United States Court of Appeals be denied.

Dated: New York, New York
February 22, 1991

Respectfully submitted,

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APPENDIX

1. Section 301 of the Labor-Management Relations Act provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

2. Title VII of the Civil Rights Act of 1964 provides in relevant part:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....

42 U.S.C. § 2000e-2(a)(1).

3. Section 291 of the New York Executive Law provides in relevant part:

> 1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right.

New York Exec. Law § 291.1

4. The Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex provide in relevant part:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's

work performance or creating an intimidating, hostile, or offensive working environment.

* * *

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing

> appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(a),(d)-(f) (footnote omitted).